UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. RM BAKERY, LLC D/B/A LEAVEN & CO., A WHOLLY-OWNED SUBSIDIARY OF BKD GROUP, LLC, Respondent.	No. 19-3716 Board Case No.: 02-CA-235116

REPLY IN FURTHER SUPPORT OF MOTION TO RECALL MANDATE

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Respondent RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC ("RMB") submits this reply in further support of its motion (the "Motion") to recall the December 27, 2019 mandate (the "Mandate") and remand this matter to the National Labor Relations Board (the "NLRB") to reopen the record and permit RMB to defend this matter on the merits.

In its opening papers, RMB showed that this case satisfies the stringent standards for recalling a mandate due to the failure to respond by RMB's CFO. After concealing information about this proceeding, the CFO left RMB due to [redacted]. To hold the Company liable in this situation—where a trusted employee [redacted] withheld information that caused the Company to incur default judgments amounting to over $180,000—would be precisely the type of manifest injustice that requires a recall of the Mandate.

RMB also showed that the equities favor recalling the Mandate given that, if RMB were able to defend itself, it would likely been able to prove that the Complainants were independent contractors under governing NLRB precedent and thus not protected by the National Labor Relations Act.

Among other things, the Complainants (1) worked on their own schedule and chose when, if at all, to deliver RMB's products, (2) were free from control over the work they performed, (3) purchased their own trucks and were free to use

those trucks to earn revenue when they were not working with RMB, (4) were in business for themselves and delivered products for other companies without restriction, and (5) there was no contract of any sort stating that the Complainants were employees. Motion at 8-12; *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local* 1338, 367 N.L.R.B. 75 (2019) (citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968)).

The NLRB's opposition is unpersuasive. First, the NLRB argues that this case is somehow distinguishable from the attorney malfeasance cases that RMB relies upon. Opp. at 13; *Calloway v. Marvel Entm't Grp., a Div. of Cadence Indus. Corp.*, 854 F.2d 1452, 1475 (2d Cir. 1988) (recalling mandate where litigant was incorrectly sanctioned in district court and would have prevailed on appeal but for counsel's failure to perfect the appeal) (reversed on other grounds); *Bennett v. Mukasey*, 525 F.3d 222, 223 (2d Cir. 2008) (recalling mandate where attorney intentionally failed to prosecute appeal).

However, the NLRB does not offer any meaningful distinction from those cases other than that the malfeasance was by attorneys and here, the misfeasance or malfeasance was by the Company's CFO. The NLRB does not say how this distinction matters and it cannot: in both situations, a party placed its trust in the judgment of an agent, and in both situations the agent failed to act to the agent's detriment.

The NLRB also makes much of its purported service on the CFO and on the Company's Executive Vice President, Dan Wilczynski. As an initial matter, the NLRB was actually in contact with the CFO by telephone and by his filling out a questionnaire (Opp. at 2, 3) yet for reasons unknown claims it served Mr. Wilczynksi who did not have any knowledge of the proceedings or any reason to be on the lookout for mail from the NLRB. It would be an injustice to charge Mr. Wilczynski with knowledge of the situation when he did not receive mail, was purportedly served with documents concerning a matter of which he had little or no knowledge, and the CFO apparently withheld mail that was addressed to him. The NLRB twists RMB's words and highlights that Mr. Wilczynski spoke to a member of the NLRB, but that is misleading: his declaration states that he did not know he was speaking to the NLRB and that after the single call he was on, the CFO incorrectly told him that the call was about a "state" matter that had been resolved. Wilczynski Dec. ¶9.

The NLRB also states that it served all documents on the Company—many upon Mr. Wilczynski despite communicating only with the CFO—and misleadingly argues that RMB does not challenge the sufficiency of service. Opp. at 16-17. To be clear, RMB's opening papers do not concede the sufficiency of service and do not confirm receipt of any particular document. Motion at 4. Moreover, the NLRB's argument misses the point—that the CFO retained mail

directed to Mr. Wilcynski and *misled* RMB about the status of the NLRB proceedings, to the extent anyone at the Company other than the CFO knew of the matter. Motion at 3 (stating only that the Company was aware that "some proceeding was taking place in connection with complaints made by an independent contractor").

Still further, the NLRB's proofs of service are questionable. The NLRB argues that service by mail is proper under 29 C.F.R. § 102.4(a). Opp. at 10. However, subsection (d) of that regulation states that in "the case of service by registered or certified mail, the return post office receipt is proof of service." Although the rule states that this method of proof is not exclusive and "any sufficient proof may be relied upon to establish service," it is nonetheless probative that the NLRB is attempting to argue that its service was sufficient when none of its affidavits of service attach the return post office receipt, and other affidavits of service are unsigned. *See e.g.*, Exhibit A (unsigned affidavit of service); Exhibit B (no proof of delivery); Exhibit C (unsigned affidavit of service); Exhibit D (no proof of delivery); Exhibit E (same); Exhibit F (no proof of delivery); Exhibit G (same); Exhibit H (no proof of delivery, unclear as to how sworn or signed); Exhibit J (same).

These insufficient proofs of service, coupled with the fact that the NLRB claims to have served someone who had no involvement with the NLRB and who

worked on the production floor and did not receive email (Mr. Wilczynski), militate against a finding that service was sufficient to put Mr. Wilczynski on notice of anything.

The NLRB argues that the equities do not favor recalling the mandate because the NLRB purportedly followed its own rules concerning service. Opp. at 17. First, the proofs of service are not sufficient as shown above. Second, the fact that the NLRB claims to have followed its own rules is only one consideration and, here, the Company will face a judgement of over $180,000 as a result of its good faith reliance on its CFO.[1] The NLRB does not cite any case holding that the equities favor the NLRB merely because it claims to have followed its own rules.

The NLRB also makes irrelevant arguments that have no place in this proceeding. First, the NLRB suggests that RMB can sue the CFO or Mr. Wilcznyski. Opp. at 15, n.3. This argument is distasteful given the CFO's [redacted]

[1] The Company has acted in good faith and, since learning of this situation and retaining counsel, has taken substantial steps to comply with the Mandate's provisions, other than for back pay, notwithstanding the Company's objections to the Mandate. The Company has posted the notice required by the Mandate, has sent unconditional offers of reinstatement, and has notified the Complainants that it does not have any record of their dismissal and that such dismissal will not be used against them. The Company is also working with the NLRB to further clarify the offers of reinstatement to ensure that the Complainants have sufficient information to determine whether they will accept the offers. The Company has also notified the NLRB that, if this motion is unsuccessful, it will participate in the compliance phase of proceedings and will dispute the NLRB's calculations of back pay owed. Opp. at 18, n.5.

[redacted] and given the fact that Mr. Wilzcynski had no knowledge of the matter and information appears to have been withheld from him.

The NLRB also quibbles with the assertion that the CFO had a fiduciary duty to RMB, claiming that RMB has not shown that an employee of a Delaware LLC has a fiduciary duty. Opp. at 14, n.1. However, the CFO was employed in New York. New York law is therefore applicable to his employment and holds that "[a]n employee's fiduciary duty to her employer prohibits her from acting in any manner inconsistent with h[er] agency or trust," and she is "at all times bound to exercise the utmost good faith and loyalty in the performance of h[er] duties." *Bullard v. Drug Policy All.*, No. 18 CIV. 8081 (KPF), 2019 WL 7291226, at *6 (S.D.N.Y. Dec. 30, 2019) (citation omitted).[2]

Thus, regardless of the reasons for the CFO's actions, RMB was entitled to place its trust in him and his withholding of information and failure to act harmed RMB. *Id*. This situation is not RMB's fault and it should be permitted to defend this action on the merits.

Last, the NLRB argues that even if this Court recalls the Mandate, RMB's defenses will not be heard on remand to the NLRB because it is "undisputed" that the Board properly served RMB. Opp. at 16-17. That is not so, however, as RMB

[2] The NLRB also argues that RMB's chosen authority "did not involve an LLC," but does not cite any case saying that employees of LLCs are exempt from their fiduciary duties. Opp. at 14, n.1.

has above disputed whether the NLRB's service was sufficient. The NLRB has not cited any case where, like here, a company's reliance on its own CFO—to its detriment—resulted in a default judgment.

This situation may indeed be sufficient to reopen the record in the NLRB under applicable regulations, particularly where, as here, RMB has submitted facts to show that the Complainants were independent contractors and thus not entitled to the protections of the NLRA. *See* 102.48(c)(1) ("A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result."); Motion at 8-12; Opp. at Exh. B ("The NLRB does not have jurisdiction over independent contractors.").

Notably, the NLRB does not address RMB's arguments that, if remanded, RMB would be able to show that the Complainants were independent contractors under governing precedent. Motion at 8-12. Rather, the NLRB simply states that the time has passed to do so. Opp. at 16. Given RMB's reasons for its default, RMB should not be precluded from making its arguments on the merits.

CONCLUSION

For the foregoing reasons, and those stated in RMB's opening papers, the Court should recall the Mandate.

DATED: March 2, 2020 **GARDY & NOTIS, LLP**

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,779 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), which is less than the 2,600 word limitation set forth in Fed. R. App. P. 27(d)(2)(A). The motion complies with the typeface and style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and 32(a)(6) because it was prepared in Microsoft Word using 14-point Times New Roman font, with footnotes in 14-point Times New Roman font.

s/Orin Kurtz

Attorney for Respondent RM Bakery, LLC

Dated: March 2, 2020